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Supreme Court of the United States.

OCTOBER TERM, 1905.

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JAMES H. McKENNEY,
Clerk.

No. 142.

THE SOUTHERN PACIFIC RAILROAD COMPANY, CENTRAL TRUST COMPANY OF NEW YORK, D. O. MILLS and HOMER S. KING, as Trustees,
Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

MAXWELL EVARTS,
Of Counsel for Appellants.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

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Statement.

A bill was filed in this cause by the United States in the Circuit Court of the United States for the Southern District of California on February 28, 1901, which purported to be for the

purpose of quieting its title to certain lands mentioned therein, but was in effect for the purpose of recovering the value of the land which was claimed by the government to have been erroneously patented to the railroad company and thereafter sold by the latter to *bona-fide* purchasers. The land in question fell within the place limits of the so-called Branch Line grant to the Southern Pacific Railroad Company under the 23d section of the Act of Congress of March 3, 1871, entitled "An Act to Incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." The following facts were established on the trial of the case, and there is no dispute in the testimony in regard thereto:

One Juan Bandini received from the Mexican Government, a grant of what is termed the Rancho Jurupa in September, 1838. The boundaries of this grant were designated in a diagram which accompanied the petition made by Bandini requesting the grant, and the land granted, was, to use the words of the grant "purely that which is expressed in the petition of the party interested, and is sketched in the diagram" (Record, pp. 150, 151).

The boundaries of the grant are given in the document giving Bandini possession of the land, which paper is dated December 10, 1838 (Record, pp. 151, 156), and afterwards, on May 30, 1840, the grant of the Mexican Government to Bandini was approved by the Departmental Assembly (Record, p. 157).

After California was acquired under the Treaty of Guadalupe Hidalgo, concluded February 2, 1848, commissioners were appointed by Congress for the adjudication and settlement of California land claims under the Act approved March 3, 1851, and entitled "An Act to ascertain and settle the private land claims in the State of California" (9 U. S. Stats., at L. 631).

To this tribunal Bandini on September 25, 1852, presented his petition, asking that his claim to said land under the Mexican grant should be confirmed, and to his petition, he attached copies of the original Grant, the Act of Judicial Possession, and the Act of Approval, executed by and on behalf of the Mexican Government. In this petition Bandini specifically stated the boundaries of his claim and grant, in accordance with the boundaries of the original grant, as described in the Act of Judicial Possession received

from the Mexican Government (Record, p. 157).

After hearing the proofs and allegations in the matter, the Commission, on October 17, 1854, adjudged that the claim of the petitioner was valid, and it was decreed that the same should be confirmed. The decree of confirmation described the boundaries of the Rancho Jurupa in the same terms that it had been described in the petition and in the Grant and in the Act of Judicial Possession of the Mexican Government of 1838 (Record, p. 159).

Thereafter, an appeal was taken by the United States to the District Court for the Southern District of California, and on April 5, 1861, the decision of the Board of Land Commissioners of October 17, 1854, was affirmed. In the decree of confirmation the boundaries were again given substantially in the same language in which they appear in the original Mexican Act of Judicial Possession of December 10, 1838, and it was further expressly provided in said decree "that the lands of which confirmation is hereby made are * * * within the boundaries designated in the Judicial Possession given of said lands to Juan Bandini" (Record, p. 163).

Between the time of the decision of the Commission in 1854, and the decree of the District Court of the United States of April 5, 1861, confirming such decision, Abel Stearns acquired all the right, title and interest of Bandini in the Rancho Jurupa, and an order was entered in the proceeding on March 6, 1860, substituting the name of Stearns as appellee in the place of Bandini (Record, p. 187).

Thereafter and on May 1, 1862, an appeal was taken by the United States from the decree of the District Court, to this Court (Record, p. 196), as also appears from the mandate of this Court, dated January 8, 1875 (Record, p. 507), and pursuant to said mandate, an order was entered in the United States District Court on March 2, 1875, directing that the claimant "have leave to proceed under the decree of confirmation heretofore entered herein as under final decree" (Record, p. 510).

Pending the appeal by the Government to this Court, a survey was made of the Jurupa Grant which will be hereafter referred to in this brief as the Reynolds Survey. This survey was begun in June, 1869 (Record, p. 359, *et seq.*). The north line of the Reynolds Survey of the Rancho

Jurupa is indicated by the red line on the opposite map. The plat and field notes of the survey were duly filed with the United States Surveyor General for the district of California, and in the office of the Commissioner of the General Land Office, on February 26, 1872 (Record, p. 90).

The Reynolds Survey was never approved by the Interior Department. Shortly after the filing of the plat and field notes of the survey, the Commissioner of the General Land Office seemed to have some doubt as to the correctness of the survey, and wrote to the United States Surveyor General of California on August 8, 1872, as follows (Record, p. 294):

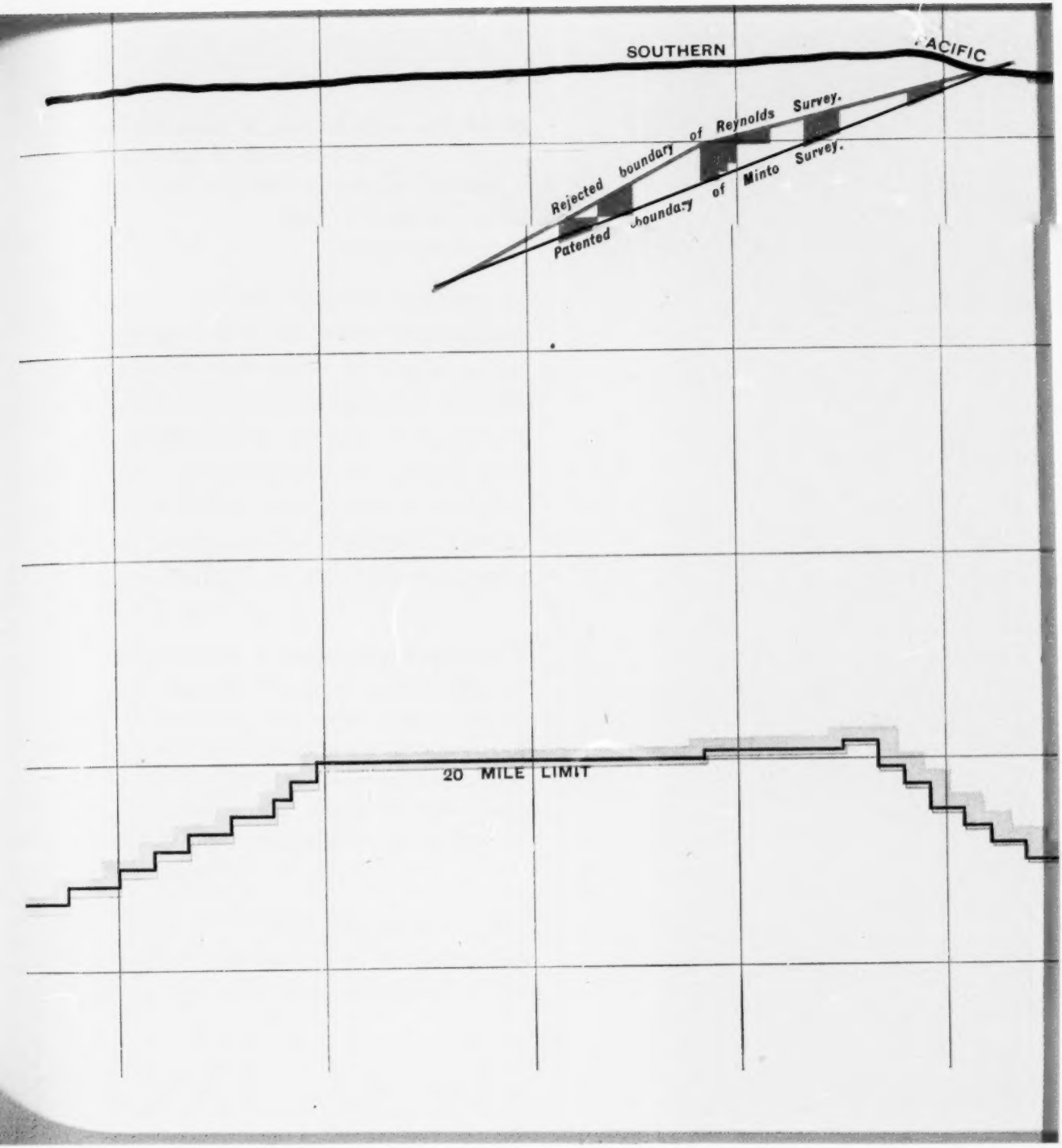
"DEPARTMENT OF THE INTERIOR.
General Land Office.
Washington, D. C.

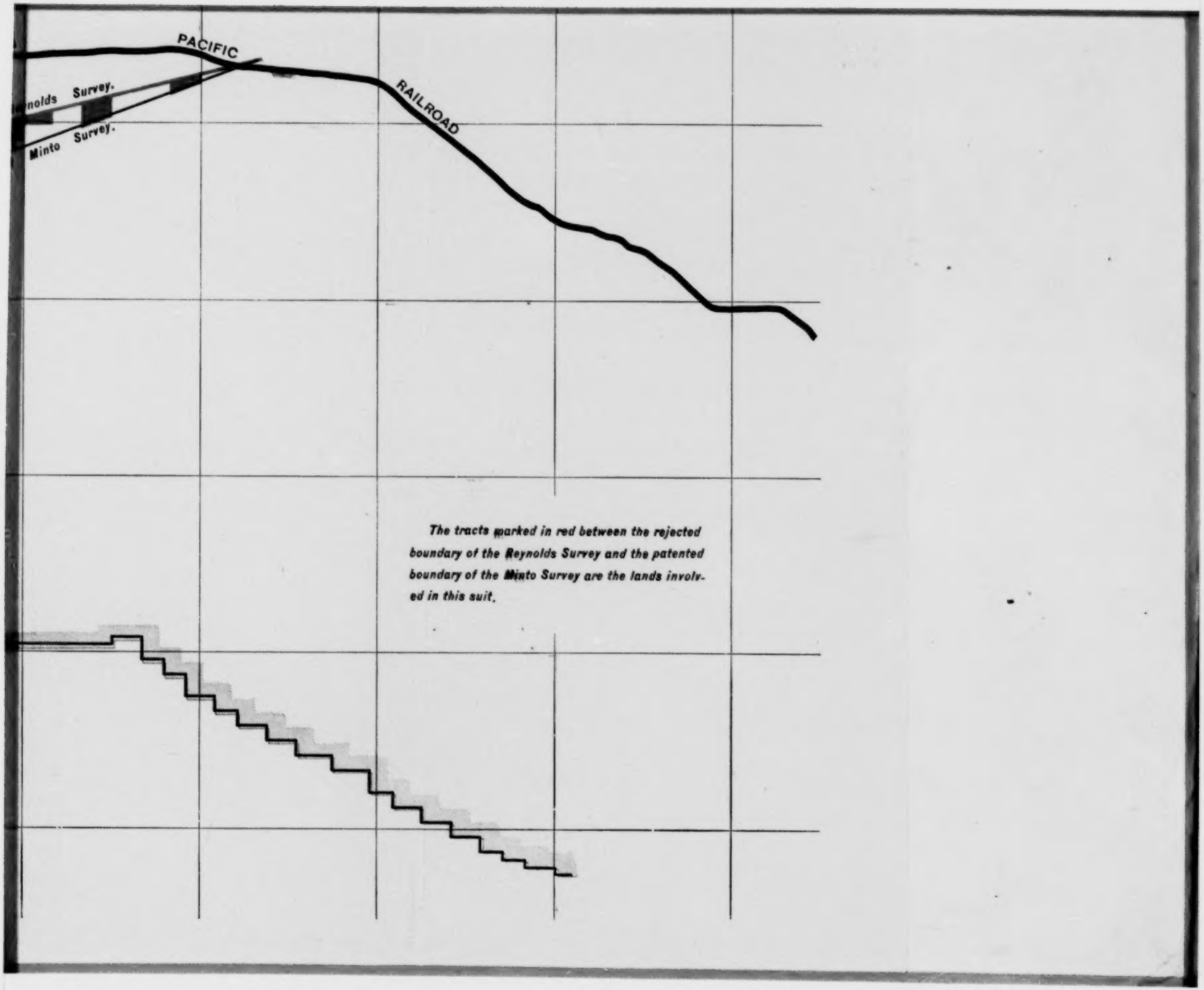
8th August, 1872.

J. R. Hardenbergh, Esq.,
U. S. Sur. Genl., Cala.,
San Francisco.

Sir:

Referring to the case of rancho "Jurupa" in Cala. Juan Bandini conf. L. C. No. 361, I have to request that you procure at the expense of the parties interested and trans-


SOUTHERN
PACIFIC
Rejected boundary of Reynolds Survey.
Patented boundary of Minto Survey.
20 MILE LIMIT


PACIFIC
RAILROAD
nolds Survey.
Minto Survey.
The tracts marked in red between the rejected boundary of the Reynolds Survey and the patented boundary of the Minto Survey are the lands involved in this suit.

mit the same to this office, a copy of the final decree of Court on *title*.

Very respectfully, your obt. Servant,
Willis Drummond,
Commissioner."

This correspondence continued from time to time as appears from the letters which passed between the various parties in regard to the matter which are set forth at pages 202, 203, 287 and 317 of the Record. Finally in the letter of the Acting Commissioner of the General Land Office to the United States Surveyor General of California dated May 13, 1876, the Reynolds survey was rejected in the following words (Record, 324, 336):

> "The survey is therefore rejected and I return herewith the report and exhibit of H. C. Hopkins, Esq., with instructions to amend the survey as you will give notice of this decision to all parties in interest allowing sixty days from notice for appeal and promptly report any subsequent action in the premises."

At the time of this survey there was no final confirmation of this grant, as an appeal was pending in this court from the decree of the

District Court, and whether such survey was made under the Act of Congress of July 1, 1864 (13 U. S. Stat., 332), or the Act of Congress of July 23, 1866 (14 U. S. Stat., 218), it was not authorized to be made until a final confirmation of the grant.

On February 21, 1877, Mr. Chandler, the then Secretary of the Interior, disapproved of the Reynolds Survey, and ordered a new survey of the grant (Record, p. 205), which was commenced on the 23d day of March, 1878 (Record, p. 217). This survey is hereafter called in this brief the Minto Survey. It is to be noticed that in this letter of the Secretary of the Interior, the decree of juridical possession of 1838 of the Mexican Government is quoted at length. Under the Minto Survey, the north line of the Jurupa Grant is indicated by a black line on the attached map. On May 23, 1879, Stearns received his patent for the Jurupa ranch as surveyed in accordance with the Minto Survey (Record, p. 395).

The land in question is marked in red on the map between the two north lines of the Reynolds and Minto surveys, and the important question that presents itself in this case is, whether the land between the incorrect northern line of the

Reynolds Survey and the correct northern line of the Minto Survey, is to be deemed *sub judice* at the time of the grant to the Southern Pacific Railroad Company under the Act of 1871, and at the date of the definite location of its line of railroad in 1874, and therefore excepted from such grant, or whether such land fell within the grant to the Railroad Company, and was properly patented to it by the Government in 1897 (Record, p. 92).

On November 20, 1900, the Commissioners of the General Land Office demanded a reconveyance by the Southern Pacific Railroad Company to the United States of the land in question (Record, p. 354). In this demand, the land was described as "between the *claimed* and the patented limits of the Mexican grant Jurupa." The Southern Pacific Railroad Company declined to make such reconveyance, as in its understanding of the matter, the land in question had never been *claimed* to be within the Rancho Jurupa. Thereupon the bill was filed herein by the United States (Record, p. 5). An answer was filed by the Railroad Company (Record, p. 82). The case was tried and a decree was entered in favor of the United States (Record, p. 114).

From this decree in the Circuit Court, an appeal was taken to the Circuit Court of Appeals, for the Ninth Circuit, which entered a decree on October 17, 1904, affirming the decree of the Court below. From the decree of the Circuit Court of Appeals, this appeal has been taken, and the single question presented upon this brief will be, whether land to which no claim has ever been made under any Mexican grant or otherwise, is to be deemed *sub judice* at the time of the Branch Line grant of 1871 to the appellant, because of the fact that a surveyor had at that time, made an error in running his line upon the face of the earth, and had improperly included the land within his survey of the Jurupa Grant.

While there are other questions of importance in this case besides the question of whether the lands in suit were *sub judice* at the time of the grant to the Railroad Company in 1871, all such questions are also involved in suit No. 141 on this docket, which will be argued at the same time with this case. We therefore respectfully refer the Court to our brief in that case on those questions, if we should be unsuccessful in our position as to the land in controversy not being *sub judice* at the time of the grant

to the appellant Railroad Company. It seemed unnecessary to repeat the argument in both briefs.

Specification of Errors.

The appellants allege that the Circuit Court of Appeals erred in the following particulars:

I.

In holding that the United States was the absolute owner in fee simple of the land involved in this case.

II.

In not holding that the Southern Pacific Railroad Company was the owner in fee simple of said land.

III.

In decreeing that the patents issued by the United States to the appellant Southern Pacific Railroad Company conveying said land should be vacated, annulled and set aside.

IV.

In holding that said land was *sub judice* at the time the grant to the appellant Southern Pacific Railroad Company under the Act of Congress of March 3, 1871, took effect.

V.

In holding that said land was excepted from said grant to the Southern Pacific Railroad Company.

VI.

In holding that said land was erroneously or improperly patented to the appellant.

VII.

In not finding that the patents for said lands were duly and properly issued by the United States to the Southern Pacific Railroad Company.

VIII.

For the specifications of error on the questions involved in this case not relating to whether the land in question was *sub judice* at the time of the grant to the Railroad Company of 1871, we respectfully refer the Court to our brief in case No. 141.

FIRST POINT.

The lands in question were not sub judice at the time of the grant to the Southern Pacific Railroad Company under the Act of 1871, for the reason (1) that an appeal was pending to this Court from the decree of the United States District Court for the Southern District of California of April 5, 1861, and that therefore the Reynolds survey was unauthorized. (2) That, even if such survey was authorized, the error of a surveyor in running his lines on the face of the earth does not make land improperly included in his survey by such error sub judice.

I.

There is no dispute that an appeal was taken to this Court by the government from the decree of the United States District Court of California confirming the decision of the Commission in favor of the Mexican grant to Bandini. This is shown by the minutes of the proceedings in the District Court showing the appeal to have been taken May 1, 1862 (Record, p. 196), by the man-

date of this Court, dated January 8, 1875 (Record, p. 507), and the order of the District Court, dated March 2, 1875, giving the claimant leave to proceed under the decree of confirmation theretofore entered therein as under final decree (Record, p. 510).

An examination of the statutes under which this survey was made shows that the Surveyor General of California could not act in the matter of making a survey in pursuance of any determination of any private land claim, until such private land claim had been finally confirmed. As we understand it, the Reynolds Survey was made in pursuance of sections 6 and 7 of the Act of July 1, 1864 (13 U. S. Stats., 332). The Act in its earlier sections provides for an appeal to the Federal Court and then continues in sections 6 and 7 as follows:

> "SEC. 6. And be it further enacted, That it shall be the duty of the surveyor-general of California to cause all the private land claims *finally confirmed* to be accurately surveyed and plats thereof to be made, whenever requested by the claimants. * * * Whenever the survey and plat requested shall have been completed and forwarded to

the commissioner of the general land-office, as required by this act, the district court may direct the application of the money deposited, or so much thereof as may be necessary, to the payment of the expenses of said survey and publication.

SEC. 7. And be it further enacted, That it shall be the duty of the surveyor-general of California, in making surveys of the private land claims *finally confirmed*, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim. * * * And it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him."

It was claimed by the government in the court below and will probably be claimed here that the Reynolds Survey was made under the authority of section 8 of the Act of Congress of July 23, 1866 (14 U. S. Stat., 218). This section is as follows:

"SEC. 8. *And be it further enacted*, That in all cases where a claim to land by virtue of a right or title derived from the Spanish

or Mexican authorities has been *finally confirmed*, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, 'To expedite the settlement of titles to lands in the State of California,' and in all cases where a like claim shall hereafter be *finally confirmed*, and a survey and plat thereof shall not be requested, as provided by said sections within ten months after the passage of this act, or any *final confirmation* hereafter made, it shall be the duty of the surveyor-general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such *final confirmation* hereafter made, to cause the lines of the public surveys to be extended over such land, and and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States: Provided, That nothing in this act shall be construed

so as in any manner to interfere with the right of *bona fide* pre-emption claimants."

It is immaterial whether the Reynolds Survey was made under the Act of 1864, or under the Act of 1866. Both of those acts required a *final confirmation* of the claim before any survey, and the question is what is meant by the words "final confirmation" or "finally confirmed." As we read the statute, these words mean and necessarily mean that no survey is to be made while there is any proceeding in court. It is unreasonable to suppose that Congress, when it used those words, intended that a survey should be made when the decree awarding the claim might at any moment be reversed on appeal. The reasonable construction of these statutes would seem to be that when all litigation had ceased as to private land claims, then the Surveyor General of the United States for the District of California was authorized to make a survey, after the expiration of ten months from the time of final confirmation. The purpose of these acts as to such survey was to enable the government to determine just what public land it had subject to the general land laws of the United States. It could not do this unless it surveyed those lands

covered by claims which took them out of the public domain. The expense and labor of such survey was not to be undertaken until it was plain by a final decree of confirmation which could not be disturbed by appeal or otherwise that the private grant excepted the lands from the public domain.

The proposition that the decree of the District Court was not final within the meaning of the statute, while the appeal to this court was pending, hardly needs an authority to support it, but it was so held by Secretary Noble, in the case of *Childs* vs. *S. P. R. R. Co.*, 10 L. D., 630, 632, where he said:

> "The grant San Jacinto Nuevo was confirmed by the district court February 14, 1856, which decree of confirmation became final upon the dismissal by the supreme court of the appeal February 23, 1857."

That the decree of the District Court was not final within the meaning of the statute is certainly indicated by the language of this Court in *Newhall* vs. *Sanger*, 92 U. S., 761, 763, where it was said, referring to the Commission appointed by the Act of 1851, as follows:

"This was notice to all the world that lands in California were held in reserve to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant to maintain his rights before the commission. He was not bound by its adverse decision; but was entitled to have it reviewed by the District Court, with a right of ultimate appeal to the Supreme Court. If he, however, neglected to take timely and proper steps to obtain such review, the decision was thereby rendered final and conclusive. The lands then fell into the category of public lands. The same remark will apply to the judgment of the District Court; *but if he prosecuted his appeal to the tribunal of last resort*, the reserved lands retained their original character in all the successive stages of the cause, and they were regarded as forming a part of our national domain only after the claim covering them had been '*finally decided to be invalid.*'"

It may be insisted that the appeal of the United States from the decree of the District Court of April 5, 1861, was never perfected, and therefore should be given no consideration here, by reason of the clause in the mandate of January 8, 1875 (Record, p. 507), to the effect that

the appellant had failed to have its cause filed and docketed in accordance with the rules of this Court, yet it is clear that the appeal prevented the decree of the District Court from being final, and that the order of March 2, 1875, was required in the District Court before the claimant was given leave to proceed under the decree of confirmation of April, 1861, as under final decree.

We, therefore, respectfully submit that there was no final confirmation of the claim of Abel Stearns to the Jurupa grant at the time of the Reynolds Survey, and that said survey must be deemed to have been unauthorized, and the land in controversy not to have been *sub judice*, inasmuch as said land was not involved in said appeal, which included only the land within the true limits and boundaries of the Jurupa grant.

II.

LAND NOT CLAIMED TO BE WITHIN A MEXICAN GRANT BUT INCLUDED BY MISTAKE IN AN ERRONEOUS SURVEY OF SUCH GRANT IS NOT SUB JUDICE.

There is no evidence in the record that Bandini or Abel Stearns, his successor in interest, ever made any claim that the lands in controversy were within the limits of the Jurupa

Grant. On the contrary, the evidence would seem to show that Bandini and Stearns never claimed anything beyond the boundaries of the grant from Mexico, which were clearly defined, and which were accurately laid out on the surface of the earth by the survey of Minto. No controversy as to the confirmed boundaries was ever presented to the Commissioners or the District Court, but on the contrary the decrees confirm and the patent conveys the Jurupa ranch as *claimed and prayed.* In other words, the grantee received all he asked and claimed, and the lands in question were not within what he claimed. We have, therefore, presented the simple question whether land not claimed by the grantee to be within the limits of his grant can be deemed to be *sub judice* for the reason that the surveyor, in running out the lines of the boundaries of the grant, made an error, and by mistake included within his survey of the grant, land never claimed by the grantee or anybody else to be within its boundaries.

The question under judicial consideration or *sub judice* was whether Bandini or his successor Stearns was entitled to the Mexican grant of the Jurupa ranch of 1838. This question was finally

decided by the United States District Court either in 1861 (if the Court does not consider that the appeal of the government to this Court was effective) or in March, 1875, in favor of the claimant, and all judicial consideration of the subject was ended. The survey made by Reynolds in 1869 had no connection with the decree of the District Court, and was not undertaken for the purpose of carrying out its terms. Such survey was made simply for the assistance of the General Land Office and to enable it to accurately prepare and issue a patent for the grant. In Section 13 of the Act of Congress of March 3, 1851 (9 U. S. Stat., 631, 633), it was provided that,

> "for all claims *finally confirmed* by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be *finally confirmed* to be accurately surveyed, and to furnish plats of the same."

From the statute cited it will be seen that the

survey was made, not with relation to the decree and as part of the proceeding in which it was entered, but for the convenience of the General Land Office in preparing and issuing a patent for the land. Such survey was a mere ministerial act, which can hardly be construed into a judicial consideration of the matter. The judicial consideration of the grant terminated with the decree of the court in favor of the claimant, and the survey was but a preliminary step to obtaining the patent for the land in the General Land Office, and not a step in the judicial proceeding subsequent to and in aid of the decree therein.

No case has been found in this Court or the lower courts, or in the Land Decisions, although a thorough search therefor has been made, holding that land not claimed by any grantee of a Mexican grant, but by mistake of a surveyor included within the survey thereof, at the time of the grant of such land to a railroad, is *sub judice*, and therefore did not pass to the railroad company. None of the cases referred to by the court below or in the briefs of counsel for the Government so hold. In any case which approaches this question, the land included within the survey is claimed by the

grantee of the Mexican grant to belong to him under the grant, and there is, therefore, a matter for judicial consideration, but in the case at bar no such claim is made. Nowhere in the record is it insisted that the land in controversy was part of the grant and properly included in the survey. There is, therefore, nothing for judicial consideration, but the fact is simply, that the surveyor who ran the lines of the grant, made a mistake, and improperly included land within the boundaries of the grant, which no one ever claimed should have been so included.

In its opinion, the court below (Record, p. 652), has relied upon the case of *Newhall* vs. *Sanger*, 92 U. S. 761, and the cases following that decision, as authority for the proposition that the lands in controversy were *sub judice* at the time of the grant to the Railroad Company, by reason of the Reynolds Survey, begun in 1869. As we understand these cases, they do not pretend to so hold, but simply sustain the point that if a claim under a Mexican grant is made to land at the time of its grant to a railroad company, and is then under consideration, no matter whether such claim is ultimately held valid or not, that such land is withdrawn from the railroad grant

by reason of its being then under judical consideration.

What was decided in the Newhall case is very clearly stated by Mr. Justice BREWER, in the case of *Whitney* vs. *Taylor*, 158 U. S. 85, 92, where he says that the Newhall case was one in which,

> "the mere existence of an alleged Mexican grant, valid or invalid, and the validity of which was under investigation before the *proper tribunal* at the time of the filing of the map of definite location of one of the Pacific roads * * * was held to exclude all lands within its boundaries from the operation of the congressional grant."

It is to be noted that the decision in the Newhall case is based upon the proposition that there was an investigation pending before the proper tribunal in regard to the Mexican grant. In the case at bar, at the time of the grant to the Railroad Company in 1871, there was no investigation as to the Jurupa grant pending before any tribunal (assuming for the purposes of the argument that the appeal to this Court is not to be considered), it having already been decided many years before, that the grantee was entitled to all that he claimed under the Mexican grant, and in

the investigation which was had the land in question was not involved because not claimed in any way.

In the case of *Doolan* vs. *Carr*, 125 U. S., 618, the facts are not similar at all to the facts in the present case, as is said by the court below at page 655 of the Record. On the contrary, in the Doolan case, the land in question was not within the survey, but was claimed by the grantee of the Mexican grant to be within its boundaries, and therefore at that time, the land was clearly *sub judice* and within the Newhall decision. That is to say, the Doolan case is the reverse of the case at bar. There it was claimed that the survey did not include the land to which the claimant was entitled under its Mexican grant. In this case there is no claim whatever to the land in controversy, but it was simply included within the limits of the Rancho Jurupa by a mistake of a surveyor in running his lines.

In *Cameron* vs. *U. S.*, 148 U. S., 301, the Court held that the land in question was *sub judice* for the reason, as was said at page 307,

> "That the defendant had succeeded to all the rights of Romero in the grant, and was and has been in possession of all the build-

> ings on the four square leagues surveyed by the surveyor general and claimed, and had always claimed title to the possession of all the land within the exterior boundaries as measured in the expediente, claiming title thereto; 'that the report of the said surveyor general upon said grant has never been finally acted upon by Congress; *and that said claim and said report are still pending before Congress.*'
>
> "Upon proof of the foregoing facts, we think it clear, that defendant established a color of title to the lands in question."

In the Cameron case, the grantee under the Mexican grant made a claim to the land in question, and the Court specifically stated that because of that fact, the defendant established a color of title to the lands, and that they were therefore *sub judice* and great stress is laid upon this in the opinion of Mr. Justice BROWN, where it is said, "the claim and report are still pending before Congress; in other words that the claim is *sub judice*" (p. 311). That is to say, the decision is rested upon the ground that a claim was made to the land. Here there was no claim made to the land.

We therefore insist that the foregoing cases cited by the court below do not sustain the prop-

osition that where a claim has been allowed and there is no longer any question open in regard to it, and the surveyor in running his lines makes a mistake and includes lands not within, nor claimed to be within, the boundaries of the allowed claim, such lands are *sub judice* in any proper construction of the meaning of that term. There is no discussion in regard to the lands in controversy, no claim made to them, nothing relating to the lands for judicial consideration, and we respectfully submit that to stretch the meaning of *sub judice* so as to include a mere error of a surveyor performing a ministerial act is not warranted by the decision of any court.

The case in the Circuit Court of Appeals for the Ninth Circuit of *Southern Pacific Railroad Co.* vs. *Brown*, 75 Fed. Rep., 85, which is referred to in the court below, does not seem to touch the question now before the Court. In that case, there was some evidence that Abel Stearns claimed the particular land then in controversy. Such claim is made the basis of the decision of the Circuit Court of Appeals, the reasoning of the court being that the land was *sub judice* by reason of this claim of Stearns. In the present case, however, as to the particular land now in suit,

there is no evidence that there ever was any such claim, and if there is any evidence upon the subject at all in the record, it is to the effect that there was no such claim made by Mr. Stearns, or his predecessor in interest, Juan Bandini.

The Interior Department felt constrained to follow the decision of the Circuit Court of Appeals just cited in its determination of a case arising in regard to the Jurupa grant (25 L. D., 108), but prior to such decision of the Circuit Court of Appeals, Secretary Noble and Assistant Secretary Chandler, had both held (11 L. D., 538 and 12 L. D., 664), that a survey of a private land claim did not operate to segregate the land covered thereby from the public domain. In the case of *Duncanson* vs. *S. P. R. R. Co.*, 12 L. D., 664, 666, it was said:

> "The only question which remains to be answered is this: Was the tract claimed by Duncanson within the specified or identified limits of the Jurupa grant? A negative answer would seem to be sufficient, based upon the fact that the survey, upon which a patent issued, excluded said tract.
>
> "If it should be held that an erroneous survey of the boundaries of a private grant which embraced a tract of land a few rods

> outside the actual boundaries, could reserve the land from other appropriation, it must be held, that a like survey which embraced land a few miles outside the boundaries would also reserve said land in like manner, a doctrine which is most emphatically denied by the court in the cases herein cited."

The position of the appellants in the case at bar is, that the decision of the Circuit Court of Appeals in the Brown case is based upon the fact that Stearns made some claim to the land there in question, but that such fact does not appear in the present suit, nor in the cases decided by the Interior Department, and that the decisions of the Department were right in the first instance, and should not have been overruled because of the decision in the Brown case, which was decided upon a point which is not in the case at bar, and which did not appear in the cases before the Interior Department, viz.: that there was some claim made by Stearns to the land involved in the Brown case, and so that particular land was at the time of the grant *sub judice.*

In other words, the original construction placed by the Interior Department upon the effect of the Reynolds Survey on the grant to the appellant Railroad Company is, as it seems to us, right, and

is the one which this Court is now asked to follow upon the ground that land erroneously included within a grant by an inaccurate survey cannot be deemed to be *sub judice*.

III.

We further press upon the attention of the court that the Reynolds Survey was never approved by the Commissioner of the General Land Office. It was, therefore, ineffective in any way whatever.

The Reynolds Survey after considerable correspondence in regard to the matter on the part of the Commissioner of the General Land Office (Record, pp. 202, 203, 287, 294) was finally rejected by the letter of the acting commissioners of May 13, 1876 (Record, pp. 324, 336).

That the Reynolds Survey was required to be approved by the Commissioner of the General Land Office before becoming effective, is shown by the provision of Section 7 of the Act of July 1, 1864, which enacted that

> "It shall be the duty of the commissioner of the general land office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him."

In the case of *S. P. R. R. Co.* vs. *Mackel*, 11 L. D., 491, 493, Secretary Noble said:

> "The land reserved by the Jurupa grant was that included within the boundaries of the claim as confirmed, *i. e.*, within the boundaries shown by the record of the juridical possession. These boundaries were determined on the ground by the survey of 1878 and hence the only land reserved by said private grant was that within that survey. *To render a survey made under the Act of July 1, 1864, effective, it was necessary that it should be approved by the Commissioner of the General Land Office.* The survey of this grant made in 1869, never received the approval of your [Commissioner's] office or of this department and in fact had not, at the date the grant to the railroad company took effect, been approved by the surveyor-general. Such a survey was not effective to except these tracts in controversy from the operation of the latter grant."

Until approval by the commissioner it is difficult to see how the survey could be effective as in any way segregating the land in question from the public land.

SECOND POINT.

For the argument in regard to the other questions in this case, we refer the Court to the brief for the appellant in Case No. 141, to be argued with this case. These questions will not arise, if the Court should agree with the proposition, that the land in question was not *sub judice* at the time of the grant to the Railroad Company in 1871. If the Court should not agree with the argument on this proposition, then we respectfully refer the Court to our brief in Case No. 141 for a discussion of the questions arising out of the confirmation of the title of *bona fide* purchasers of lands erroneously patented by the Railroad Company, and the decree requiring the Railroad Company to pay $1.25 for all lands found to have been sold to such *bona fide* purchasers.

THIRD POINT.

The decree of the court below should be reversed.

MAXWELL EVARTS,
Of Counsel for the Appellants.

[53,928 A]